STATE OF MICHIGAN

COURT OF APPEALS

JOHN LINKER, Plaintiff-Appellant,	UNPUBLISHED November 25, 2003
v	No. 238342 Genesee Circuit Court
CITY OF FLINT and THERON WIGGINS, Defendants-Appellees.	LC No. 00-069235-CL

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this reverse discrimination claim, plaintiff John Linker appeals by right the trial court's judgment granting defendants' motion for summary disposition under MCR 2.116(C)(10). We reverse.

Plaintiff, a Caucasian battalion chief in the City of Flint Fire Department, filed suit against the City of Flint and Fire Chief Theron Wiggins after Wiggins promoted two purportedly less qualified African-Americans to the position of Assistant Fire Chief over plaintiff. Plaintiff claimed that his civil rights were violated under 42 USC 1983 and under the Michigan Civil Rights Act (MCRA), MCL 37.2101 *et seq.* The trial court dismissed plaintiff's claims after finding that plaintiff had presented no direct evidence of discrimination and had not presented circumstantial evidence sufficient to survive the *McDonnell-Douglas*[1] test.

Plaintiff claims that he presented both direct and circumstantial evidence that Wiggins's reasons for not promoting him were based on racial bias. We agree.

This Court reviews a trial court's ruling on a summary disposition motion de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Where the motion was granted under MCR 2.116(C)(10), this Court must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party

[1] *McDonnell Douglas v Green*, 411 US 792, 802, 804; 36 L Ed 2d 668; 93 S Ct 1817 (1973).

and determine whether the moving party was entitled to judgment as a matter of law. *Id*. at 120; *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Generally, when deciding a motion for summary disposition under MCR 2.116(C)(10), a court cannot make findings of fact. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The court's job is merely to review the record evidence and all reasonable inferences therefrom and decide whether a genuine issue of any material fact exists to warrant a trial. *Id.* The moving party has the burden of supporting its position with evidence showing that there are no disputed facts. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). All reasonable inferences are to be drawn in favor of the nonmoving party. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999).

A court must be liberal in finding a genuine issue of material fact. *Marlo Beauty v Farmers Ins*, 227 Mich App 309, 320; 575 NW2d 324 (1998). Only where the nonmoving party fails to support its position with evidence showing that disputed facts exist should the motion be granted. *Maiden, supra* at 120; *Smith, supra* at 455 n 2. Where a case involves questions of credibility, intent or state of mind, summary judgment is hardly ever appropriate. *Harrison v Olde Financial Corp,* 225 Mich App 601, 606 n 5; 572 NW2d 679 (1997); *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner, supra* at 161; *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). Thus, where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at a trial by the trier of fact, and a motion for summary judgment cannot be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

For a successful employment discrimination claim – be it based on race, sex, or age – a plaintiff must produce some evidence of bias. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). If the plaintiff has direct evidence of bias, then he will proceed "in the same manner as a plaintiff would prove any other civil case." *Id.* at 462, citing *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537-539; 620 NW2d 836 (2001), and *Matras v Amoco Oil Co*, 424 Mich 675, 683-684; 385 NW2d 586 (1986). In the civil rights context, direct evidence is "'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Hazle, supra,* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp,* 176 F3d 921, 926 (CA6 1999). See also *Downey v Charlevoix Road Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998), and *Harrison, supra* at 610.

Statements that are made outside the immediate adverse action context – so-called "stray remarks" – and which plaintiff alleges to be direct evidence, must be examined for relevancy using the following four factors: "(1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed

remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?" *Krohn v Sedgwick James, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001).

In this case, Rico Phillips, a former union vice-president, testified that on several occasions, Wiggins disciplined Caucasian firefighters more harshly than African-Americans and that he thought Wiggins was racist. Plaintiff also presented testimony of former deputy fire chief Willie Miller that Wiggins on a daily basis used terms such as "honky" and "white boy." Miller also testified that Wiggins, in a different promotion context, stated that "honkies" did not have anything coming to them from him. It was also alleged that Wiggins referred to the Caucasian union president as "Massa Joe" and to have said that he would have no problem firing a Caucasian firefighter.

We must review the evidence in this case with the *Krohn* factors in mind. These statements came directly from the decision-maker, seem to form a pattern of biased comments, and were clearly reflective of discriminatory bias. See *Krohn*, *supra* at 292. The time frame of the comments is not clear. But Miller was in the department at least through 1999, so presumably the daily racist remarks were heard up until then. At the very least, plaintiff raised a genuine issue of material fact regarding Wiggins's remarks. When a plaintiff produces evidence that raises a genuine issue of material fact regarding possibly discriminatory remarks, whether those remarks give rise to liability "is an argument for the finder of fact to consider" and summary disposition is not appropriate. *DeBrow*, *supra* at 541.

Thus, although defendant produced evidence of legitimate, non-discriminatory reasons for the challenged promotions, and although nothing in the record suggests that the two African-American applicants were not highly qualified, we nonetheless reverse because the substantial and continuous use of racial epithets by the fire chief raises a material issue of fact for the jury's consideration. Were the racial epithets isolated and far removed in time from the challenged event, this would be another matter. But according to former deputy fire chief Miller, the chief used racial epithets daily for a prolonged period of time and in the context of employment decisions. Accordingly, although the substantial qualifications of the minority candidates makes this a very close case, the undisputed unfortunate comments of the chief regarding non-minorities in the workplace and regarding workplace decisions leaves us with little choice but to reverse and remand to allow the jury to assess all the evidence.

Because we conclude that plaintiff presented genuine issues of material fact regarding direct evidence of discrimination, we need not reach the issue of whether the same is true under the *McDonnell-Douglas* framework.

We reverse and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad